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Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

ROBERTO LAUDERBAUGH
YEOMAN THIRD CLASS
U.S. NAVAL RESERVE
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

Whether nearly 500,000 members of the Individual Ready Reserve, who do not participate in military drills or receive any pay or benefits, are subject to court-martial jurisdiction for offenses committed during prior active duty service.

Whether Articles 2 and 3 of the Uniform Code of Military Justice unconstitutionally encroach upon the jurisdiction of Article III courts, by extending court-martial jurisdiction over inactive members of the Individual Ready Reserve.

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In The
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ROBERTO LAUDERBAUGH
YEOMAN THIRD CLASS
U.S. NAVAL RESERVE
Petitioner,

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

Yeoman Third Class Roberto Lauderbaugh, U.S. Naval Reserve, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App. A, *infra*, 1a) is not yet reported. The decision of the United States Navy-Marine Corps Court of Criminal Appeals (App. B, *infra*, 3a) is unpublished.

JURISDICTION

The United States Court of Appeals for the Armed Forces entered its judgment on September 17, 1999. This Court's jurisdiction is invoked under 28 U.S.C. §1259(3).

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 8, Clause 14 of the U.S. Constitution provides, in relevant part:

> The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces[.]

STATUTORY PROVISIONS INVOLVED

Article 2(d), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 802(d) (1998) provides, in relevant part:

> (1) A member of a reserve component who is not on active duty and who is made the subject of proceedings . . . with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of

(A) investigation under section 832 of this title (article 32);

(B) trial by court-martial; or

(C) nonjudicial punishment under section 815 of this title (article 15).

(2) A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was

(A) on active duty; or

(B) on inactive-duty training . . . .

(3) Authority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President.

(4) A member may be ordered to active duty under paragraph (1) only by a person empowered to convene general courts-martial in a regular component of the armed forces.

(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not

(A) be sentenced to confinement; or

> (B) be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (1)).

Article 3, UCMJ, 10 U.S.C. § 803 (1998) provides, in relevant part:

> (a) Subject to section 843 of this title (article 43), a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.
>
> * * *
>
> (d) A member of a reserve component who is subject to this chapter is not, by virtue of the termination of a period of active duty or inactive-duty training, relieved from amenability to the jurisdiction of this chapter for an offense against this chapter committed during such period of active duty or inactive-duty training.

STATEMENT OF THE CASE

A. The Facts

The Individual Ready Reserve [IRR] is a "manpower pool comprised principally of individuals having had training, having served previously in the [active duty component] or in the Selected Reserve[1], and having some period of their [service obligation] remaining." *See* Department of Defense Directive 1215.6 (Dec. 18, 1990) at Enclosure 2, page 3. Members of the IRR are generally not entitled to pay or other military benefits, such as medical care or commissary privileges. Members of the IRR are not required to participate in any regularly scheduled military drills. Their sole military obligations are to report for one day of duty every two years for medical and administrative screening, and to notify the military of any change in their recall address. *Id.* at 8.

In September 1990, Petitioner enlisted in the United States Naval Reserve for a period of 8 years. (App. Ex. I-a). Pursuant to this agreement, Petitioner agreed to serve 24 months on active duty and 72 months in the Individual Ready Reserve [IRR]. *Id.* On June 7, 1991, Petitioner increased his active duty obligation to four years. (App. Ex. I-b). In doing so, his remaining reserve obligation (48 months) was relegated to service in the IRR.

On December 27, 1995, Petitioner fulfilled his

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[1] The Selected Reserve consists primarily of the traditional "drilling" reservists, who typically spend one weekend per month and two weeks per year on active duty.

active duty commitment and was released from active duty, receiving his Form DD 214. (App. Ex. I-c). As part of the revised enlistment contract, he was immediately transferred to the IRR. (App. Ex. I-d).[2] Consequently, between his release from active duty in December 1995, and his recall to active duty in May 1996, Petitioner did not participate in any military drills nor did he receive any pay from the Navy.

On April 5, 1996, pursuant to Article 2(d), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 802(d) (1998)[3], the Commander, Naval Reserve Force, New Orleans, Louisiana, recalled Petitioner to active duty for the purposes of a pretrial investigation into events occurring prior to his release from active duty. *See* Article 32, UCMJ, 10 U.S.C. § 832 (1998). In compliance with this order, Petitioner reported for duty to Naval Air Systems Command, Arlington, Virginia, on May 6, 1996. As a result of the subsequent investigation, the Commander of Naval Air Systems Command convened a general court-martial to dispose of several charges. The original charges referred against Petitioner alleged misconduct that occurred prior to his release from active duty. Additional charges, involving events that occurred after his recall to active duty, were referred several weeks later.

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[2] Shortly thereafter, Petitioner requested a paid position (with a corresponding drilling requirement) in the Naval Reserve. That request was approved; however, Petitioner subsequently changed his mind and was transferred back to the IRR, without ever participating in any drill periods, on March 21, 1996. (App. Ex. I-e and I-f).

[3] The versions of the applicable statutory provisions then in effect are identical to the current versions.

B. Proceedings Below

Petitioner was tried by general court-martial, comprised of a military judge alone, beginning on August 29, 1996. Prior to the entry of pleas, Petitioner moved to dismiss the charges and specifications before the court-martial, asserting a lack of personal jurisdiction. The military judge denied that motion. Petitioner sought interlocutory review of this ruling by filing a petition for extraordinary relief with the United States Navy-Marine Corps Court of Criminal Appeals. That petition was denied without comment or written opinion.

Following the interlocutory litigation and pursuant to a negotiated pretrial agreement, Petitioner then entered pleas of guilty to larceny of a checkbook, forgery of a check, writing checks with insufficient funds, and wrongful use of cocaine. On December 16, 1996, Petitioner was found guilty in accordance with his pleas and sentenced to confinement for 22 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (Commander, Naval Air Systems Command) approved the sentence as adjudged. *See* Article 60, UCMJ, 10 U.S.C. § 860 (1998). Pursuant to the pretrial agreement, all confinement in excess of twelve months was suspended for a period of twelve months.

On appeal, Petitioner again asserted a lack of personal jurisdiction due to his status in the IRR. The United States Navy-Marine Corps Court of Criminal Appeals [NMCCA] rejected that argument and affirmed the findings and sentence in an unpublished decision, relying upon the decision of the United States Court of Appeals for

the Armed Forces [CAAF] in *Willenbring v. Neurauter*, 48 M.J. 152 (1998). *See United States v. Lauderbaugh*, No. 96-2071 (N.M. Ct. Crim. App. Jan. 29, 1999), Appendix B. Petitioner then filed a Petition for Grant of Review at CAAF on April 5, 1999. That court granted review and summarily affirmed the decision of NMCCA. *See United States v. Lauderbaugh*, __ M.J. __ (C.A.A.F. Sep. 17, 1999), Appendix A. In its summary disposition, CAAF also relied upon its prior holding in *Willenbring v. Neurauter*.

REASONS FOR GRANTING THE PETITION

I. This case presents this Court with an opportunity to resolve a conflict between the Court of Appeals for the Third Circuit and the Court of Appeals for the Armed Forces

Civilian courts are "the normal repositories of power to try persons charged with crimes against the United States." *Reid v. Covert*, 354 U.S. 1, 21 (1957). The jurisdiction of military tribunals, however, is very limited and was intended to be only "a narrow exception to the normal and preferred method of trial in courts of law." *Id.* (footnote omitted). Accordingly, any expansion of court-martial jurisdiction necessarily encroaches upon the jurisdiction of federal courts established under Article III of the Constitution. *See Toth v. Quarles*, 350 U.S. 11, 15 (1955). This Court has held that neither civilian ex-servicemembers nor dependent family members of active duty personnel can be tried by courts-martial. *See Toth v. Quarles*, 350 U.S. at 23; *Reid v. Covert*, 354 U.S. at 32.

This case poses a related question: whether the military can exercise court-martial jurisdiction over a servicemember who leaves active duty, but retains an inactive affiliation with the military as a member of the Individual Ready Reserve.

As a question of statutory construction, the resolution of this issue hinges on the meaning of the term "active duty." In *Murphy v. Garrett*, 29 M.J. 469, 471 (C.M.A. 1990), the then-U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces) examined whether the term "active duty" in Article 2(d)(2)(A), UCMJ, describes only those periods of active duty while a servicemember is in a reserve component, or whether it includes *all* periods of the member's time in an active duty status. That court concluded that "active duty" encompasses active service in both the regular and reserve components. *Id.* at 471. Accordingly, under CAAF's interpretation, an active duty servicemember who completes his service commitment and leaves active duty would still be subject to court-martial jurisdiction if he remains a member of the reserves.

The same issue, in the same case, was later examined by the U.S. Court of Appeals for the Third Circuit in *Murphy v. Dalton*, 81 F. 3d 343 (3rd Cir. 1996), but with a different conclusion. The Third Circuit found the term "active duty" to be unclear in the statute, and turned to the legislative history for its meaning. *Id.* at 351. The Third Circuit concluded that in enacting Article 2(d), UCMJ, Congress intended to allow the military to retain court-martial jurisdiction only over drilling reservists who regularly enter active duty to participate in weekend drill periods, and who are then released from active duty at the

conclusion of the drill period.

According to the Third Circuit, Article 2(d) (and presumably Article 3(d) as well) thus confers jurisdiction over all periods of a reservist's active duty time *in the reserves*, and specifically addresses the jurisdictional gap recognized by CAAF's predecessor in *United States v. Caputo*, 18 M.J. 259 (C.M.A. 1984). *Id.* In *Caputo*, the then-Court of Military Appeals held that, under the laws and regulations then in effect, personal jurisdiction over a reservist for offenses committed during a period of active duty training terminates upon the reservist's release from active duty. *See Caputo*, 18 M.J. at 266-68.

Thus, under the Third Circuit's analysis, an active duty servicemember would only be subject to court-martial jurisdiction for offenses occurring during his active duty commitment, and not during a subsequent period of service in the reserves. Likewise, a member of the reserves would only be subject to court-martial jurisdiction for offenses occurring during his drill periods in the reserves, not those that occurred during any prior periods of full-time active duty service.

CAAF revisited this issue in *Willenbring v. Neurauter*, again concluding that the meaning of "active duty" was clear on its face. 48 M.J. at 172. In *Willenbring*, however, CAAF also relied upon the statutory definition of the term, which ostensibly makes no distinction between the regular and reserve components of the armed forces. *Id.* at 173; 10 U.S.C. § 101(d)(1) (1992). CAAF specifically rejected the Third Circuit's analysis in *Murphy v. Dalton*, stating that the Third Circuit's decision "fails to address the consequences of

treating prior-service offenses in the Reserves differently from prior-service offenses in the regular components." *Willenbring*, 48 M.J. at 174. There is thus a clear split between these two courts. A reserve servicemember residing in the Third Circuit could now be simultaneously subjected to conflicting precedents.

The Third Circuit correctly addressed this issue, realizing that the reserve community is fundamentally different from the active duty community. The conduct of an active duty servicemember has an obvious and pronounced impact on good order and discipline in the armed forces. A reserve servicemember, however, is a true "citizen soldier," whose life outside the military must be balanced against the needs of good order and discipline. The Third Circuit's analysis merely recognizes the obvious: when a servicemember leaves active duty but remains in the reserves, court-martial jurisdiction must be strictly limited to reflect this change in status. This observation is particularly relevant when the servicemember's reserve time is "inactive," and the servicemember no longer has any noticeable impact on good order and discipline in the armed forces.

II. This case presents an important question of court-martial jurisdiction, potentially affecting hundreds of thousands of former servicemembers in the Individual Ready Reserve

The Individual Ready Reserve (IRR) consists of nearly 500,000 servicemembers in the Army, Navy, Marine Corps, Air Force, and Coast Guard. *See* Department of

Defense Selected Manpower Statistics, Fiscal Year 1998,[4] at Table 5-4.[5] In 1993, the total number of personnel in the IRR was over 750,000. Although these personnel have some contacts with the military, they are essentially full-time civilians. Their military obligations are extremely limited and wholly administrative in nature, and they do not qualify for most military benefits.

This Court has ruled that the Constitution does not permit military jurisdiction over civilian ex-servicemembers who have severed all relationships with the military. *See Toth v. Quarles*, 350 U.S. at 14. Additionally, this Court expressed its preference for a civilian jury trial when such an option is available. As this Court noted:

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article 3 of our Constitution. Free Countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.

Toth, 350 U.S. at 22-23. Moreover, the original version of Article 3(a), UCMJ, afforded court-martial jurisdiction over certain servicemembers only for serious offenses and where the accused would otherwise not be subject to state

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[4] This publication is no longer available in hard copy form, but can be accessed via the internet at:

<http://web1.whs.osd.mil/mmid/m01/fy98/m01fy98.pdf>.

[5] As of September 30, 1998, there were 459,636 personnel in the IRR, distributed as follows: Army: 226,479; Navy: 113,138; Marine Corps: 58,276; Air Force: 56,459; Coast Guard: 5284.

or federal jurisdiction. *See Murphy v. Dalton*, 81 F.3d at 349; *Willenbring v. Neurauter*, 48 M.J. at 159-160. The current version of Article 3(a), was enacted "to ensure that a court-martial has jurisdiction over a servicemember for offenses committed during a prior enlistment." *See* S. Rep. No. 102-352, at 278 (1992).

This language strongly suggests that the changes to Article 3(a) were meant to clarify and address the continued impact of *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949). In *Hirshberg*, this Court held that military jurisdiction over an enlistment period lapses after a discharge for that enlistment, even where the member subsequently re-enlists. *See Murphy v. Dalton*, 81 F.3d at 347. The original version of Article 3(a) was intended to "clos[e] the loophole" identified in *Hirshberg*. *See Willenbring v. Neurauter*, 48 M.J. at 161 (citation omitted). Notwithstanding these changes to the UCMJ, "*Hirshberg* remains binding precedent." *Murphy v. Dalton*, 81 F.3d at 347 (citations omitted). Thus, the changes to Article 3(a) made *all* offenses from a prior enlistment subject to court-martial jurisdiction, rather than only serious offenses that could not be tried in civilian court. Nothing in the legislative history of Article 3(a) or its amendments indicates that Congress ever intended to expand court-martial jurisdiction over inactive reservists who no longer participate in active military service.

The practical differences between the various reserve components also support Petitioner's position. Servicemembers in the Selected Reserve (i.e., drilling reservists) are "called upon more frequently and for longer periods in peacetime than ever before . . . ." *See Willenbring v. Neurauter*, 48 M.J. at 156 (quoting

Secretary of Defense, Annual Report to the President and the Congress (1997)). Accordingly, drilling reservists can and do have a pronounced impact on good order and discipline within the armed forces. In contrast, members of the IRR are merely a repository of former servicemembers who could be recalled during a time of war or national emergency. Members of the IRR thus have little or no impact upon the day-to-day functions of a military unit.

This distinction is readily apparent in the legislative history to the 1986 Amendments to the UCMJ, which added Articles 2(d) and 3(d) to the Code. The catalyst for the amendments was the integration of the reserve forces into the active-component mission, including joint training exercises and augmentation of active duty units. H.R. Rep. No. 99-718, at 226-27 (1986). The amendments evinced a legislative intent to "ensure morale and discipline within a command" and to "bridge the jurisdictional gap" identified in *United States v. Caputo*, 18 M.J. 259 (C.M.A. 1984). *Id.* Expanding court-martial jurisdiction over inactive reservists advances neither of these stated objectives.

The then-Court of Military Appeals, in dicta, tangentially addressed the potential question of court-martial jurisdiction over IRR members in *Murphy v. Garrett*, 29 M.J. 469 (C.M.A. 1990). In the lead opinion, Judge Cox wrote:

> Because of [Murphy's] *continuing active contacts* with the United States Marine Corps through the regular period of inactive-duty training and the nature of the charges against him, we need not address this issue [the constitutional limitations of trying civilians

> by courts-martial]. Likewise, we do not decide the constitutional question of whether a member of the inactive reserve who has had *no contacts* with an armed force could be ordered to active duty [to stand trial].

Murphy, 29 M.J. at 471 (emphasis added and in original). Chief Judge Everett, in his concurring opinion, also stated that Murphy's case was "not the case of a person who, after leaving active duty, has remained in the inactive reserve but has not participated in military drills or training." *Id.* at 472. Likewise, in *Willenbring v. Neurauter*, the accused was again a member of the Selected Reserve and participated in regularly scheduled drills. 48 M.J. at 154. Inexplicably, when Petitioner's case presented the exact question envisioned, and deliberately left unanswered, by the *Murphy* court, CAAF merely relied upon these earlier decisions and affirmed jurisdiction over Petitioner.

Under CAAF's analysis, servicemembers who fulfill their active duty obligations but must remain members of the Individual Ready Reserve for several additional years would be subject to recall for any offenses committed while on active duty. The statute of limitations for most military offenses is five years. *See* Article 43, UCMJ, 10 U.S.C. § 843 (1998). Thus, a servicemember would be subject to involuntary recall to active duty and trial by court-martial even after several years of wholly civilian life. This interpretation is simply not consistent with this Court's rationale in *Toth v. Quarles*.

Courts-martial "are similar in many respects to civilian proceedings, but it is well-established" that such tribunals do not afford the same procedural rights as Article

III courts. *Willenbring v. Neurauter*, 48 M.J. at 157. For example, civilian juries must reflect a representative cross-section of the community, while courts-martial members are selected by the military commander who convenes the court-martial. *Id.* at n.3 (citations omitted). Military judges do not possess life tenure or guaranteed salaries like their Article III counterparts. *See Toth v. Quarles*, 350 U.S. at 17. There is no Fifth Amendment right to indictment by grand jury in the military justice system. *Id.* at 14 n.5. As this Court stated, "military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Id.* at 17.

In this case, Petitioner is in essentially the same position as the accused in *Toth v. Quarles*. Petitioner had almost no contact with the Navy between his release from active duty on December 27, 1995 and his recall to active duty pursuant to Article 2(d), UCMJ. Petitioner received his Form DD 214 releasing him from active duty and maintained his inactive status in the IRR solely as a result of his initial reserve obligation. While Petitioner had minimal military obligations as a member of the IRR, he did not attend any drills, receive any pay or benefits, or wear a uniform. Nor was he authorized to use a military commissary, exchange, or medical facility. Petitioner's military service in the Individual Ready Reserve was merely serving as a name on a list, ready to return to duty in the event of an emergency mobilization.

Therefore, for all practical purposes, petitioner obtained "civilian status" and had only a nominal connection to the military at the time of his recall. The DD

214 form that released Petitioner from active duty thus operated as the functional equivalent of a full discharge, with a continuing service obligation only in the event of a national emergency. Extending court-martial jurisdiction over former servicemembers in the Individual Ready Reserve is neither what Congress intended nor what the Constitution permits.

CONCLUSION

Wherefore, the petition for a writ of certiori should be granted.

Respectfully submitted,

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December 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

USCMA Dkt. No. 99-0516/NA
Crim.App. Dkt. No. 97-2071

UNITED STATES,
APPELLEE

v.

ROBERTO LAUDERBAUGH,
APPELLANT

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, we conclude that the action taken by the court below was correct as a matter of law. Our decision in *Willenbring v Neurauter*, 48 M.J. 152 (1998) supports the finding that the court-martial had personal jurisdiction over the appellant. Accordingly, it is by the Court, this 17th day of September, 1999,

ORDERED:

That the petition is hereby granted; and

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,

/s/Thomas F. Granahan
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (HARRIS)
Appellate Government Counsel (GRIMES)

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

BEFORE

R.B. LEO R.H. TROIDL D.A. ANDERSON

UNITED STATES

V.

ROBERTO LAUDERBAUGH, 277-80-4878
Yeoman Third Class (E-4),
U.S. Naval Reserve

NMCM 96 2071 Decided 29 January 1999

Sentence adjudged 16 December 1996.
Military Judge: R.L. Rodgers.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Air Systems Command, Arlington, VA.

LT DALE O. HARRIS, JAGC, USNR, Appellate Defense Counsel
LT JAMES E.GRIMES, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

We have examined the record of trial, the appellant's assignments of error, and the Government's response. With the exception of Specification 1 of Charge I, larceny of military property, we conclude that the findings are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Articles 59(a) and 66(c), Uniform Code of Military Justice, 10 U.S.C. §§ 859(a) and 866(c)(1994) [hereinafter UCMJ]. With respect to the sentence, we will take corrective action in our decretal paragraph as a result of our action with respect of the above charge.

The appellant was convicted, in accordance with his pleas, at a general court-martial before a military judge alone of the wrongful use of cocaine, larceny of military property, forgery, fraudulently making and uttering a check, and three counts of dishonorably failing to maintain sufficient funds in his checking account, in violation of Articles 112a, 121, 123, 123a, and 134, UCMJ. He was sentenced to a bad conduct discharge, confinement for 22 months, total forfeitures, and reduction to E-1. In accordance with the provisions of the pretrial agreement, the convening authority approved the sentence, but suspended all confinement in excess of 12 months for 12 months from the date of his action.

I.

In his first assignment of error, the appellant contends that the court-martial lacked personal jurisdiction over him because he was an inactive reservist who was no longer on active duty and who had no other contacts with the military. This assignment of error is without merit.

On 17 September 1990, the appellant enlisted in the United States Naval Reserve for eight years. He served on active duty for four years and was released from active duty on 27 December 1995 to serve out the balance of his enlistment in the Individual Ready Reserve [hereinafter IRR]. As a member of the IRR, the appellant was not required to drill, nor did he receive any military pay.

However, on 5 April 1996, he was involuntarily recalled to active duty for purposes of a pretrial investigation into offenses allegedly committed prior to his earlier discharge from active duty. The investigation resulted in this court-martial. At trial, the appellant moved to dismiss the charges for lack of personal jurisdiction. The military judge denied the motion and set forth his findings of fact and legal conclusions in Appellate Exhibit III.

In his brief, the appellant urges this court to follow as precedent the holding of *Murphy v. Dalton*, 81 F.3d 343 (3d. Cir. 1996), wherein the Federal Court of Appeals for the Third Circuit concluded that Article 2(d)(2)(A), 10 U.S.C. § 802(d)(2)(A)(1988) does not permit a reservist's involuntary recall to active duty for offenses committed while on active duty in a regular component of the armed forces, but only for offenses committed during "those periods of active duty served by a reservist while performing duty in [a reserve component]." *Id.* at 352. We disagree.

Shortly, after the appellant filed his brief, our superior court rejected the Third Circuit's restrictive interpretation of the statute. *Willenbring v. Neurauter*, 48 M.J. 152, 172 n.13. Concluding that "Articles 2(d), 3(a), and 3(d) should be read in harmony," the court held that

"Article 2(d) authorizes a reservist to be ordered to active duty to face trial by court-martial for both current-service and prior-service offenses, including offenses committed while a member of the regular component." *Id.* at 175.

Appellant next argues that jurisdiction over a discharged servicemember can only be extended where the member has continuing active duty contacts with the military. Since he did not take part in weekend drills and was subject to recall only in the event of a presidentially-declared national emergency, personal jurisdiction could not attach. We again disagree.

The statutory provisions of Articles 2 and 3, UCMJ, do not differentiate between different classes of reservists. As a reservist in the IRR, the appellant was subject, by statute, to court-martial jurisdiction due to his military status alone and not the extent of his military contacts. *See* Art. 3(a) and 3(d), UCMJ. Accordingly, we find that there was personal jurisdiction over the appellant in this court-martial and that the military judge did not err in denying the appellant's motion to dismiss for lack of personal jurisdiction.

II.

In his second assignment of error, the appellant contends that the military judge erred by finding that the initial review officer's decision to continue pretrial confinement was not an abuse of discretion and by denying the appellant's motion at trial to be released from pretrial confinement. This assignment of error is without merit.

A servicemember may not be detained in pretrial

confinement unless there is probable cause to believe that he committed a court-martial offense, that pretrial confinement is necessary to ensure his presence for trial or to preclude serious criminal misconduct from occurring while awaiting trial, and that less severe forms of restraint are inadequate. RULE FOR COURTS-MARTIAL 305(h)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). A neutral and detached officer is appointed to review the initial basis for confining the member and to determine if continued pretrial confinement is warranted. Upon motion, the military judge determines whether the review officer abused his discretion by not releasing the detainee from pretrial confinement and whether the detainee's confinement should continue. On appeal, we examine the decisions of the review officer and the military judge for abuse of discretion.[6] *United States v. Gaither*, 45 M.J. 349, 351-52.

The appellant was placed in pretrial confinement on 18 September 1996, as a result of additional charges of drug use, making and uttering personal checks with the intent to defraud, and dishonorably failing to pay just debts while he was awaiting trial by court-martial on other charges. Exhibit A of Appellate Exhibit IV.[7] The initial review was

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[6] An abuse of discretion occurs where "the military judge's findings of fact are clearly erroneous or his decision is influenced by an erroneous view of the law." *United States v. Kelley*, 45 M.J. 275, 280 (1996).

[7] In a memorandum to the review officer, the appellant's commanding officer stated: "YN3 Lauderbaugh has a demonstrated pattern of serious disciplinary problems. He should be retained in pretrial confinement to lessen the opportunity for further serious misconduct and ensure good order and discipline. Additionally, due to the continual addition of charges, he is considered a potential flight risk." Exhibit B of Appellate Exhibit IV.

conducted on 23 September, and the review officer concluded, without explanation, that continued confinement was warranted. On 8 October, the appellant moved to have the military judge release him from confinement contending that the review officer's decision constituted an abuse of discretion. After making findings of fact, the military judge denied the appellant's motion for release from confinement. He held that the review officer did not abuse his discretion and that the appellant should remain in confinement in light of a continuing pattern of serious misconduct since his recall to active duty and his command's observation over several months that lesser restraint would not preclude the likelihood of future misconduct of this nature. Record at 53-56.

The premise of the appellant's argument is that the appellant's additional offenses, which involved bad checks and drug use, do not constitute serious criminal misconduct as to warrant pretrial confinement and, even if they are serious, lesser forms of restraint could have been used. Therefore, he argues, the review officer and the military judge erred. We disagree.

The appellant's misconduct evidenced a pattern of disregard for military authority. The offenses which precipitated his placement in pretrial confinement are not minor military infractions. They included the use of cocaine and the issuance with the intent to defraud of three checks totaling over $4,500. Therefore, it would not be unreasonable for the review officer and the military judge to conclude that the appellant would hardly feel constrained from engaging in further misconduct by an oral or written order directing him to remain within specified limits of a military base. Accordingly, we find that neither the review officer, nor the military judge, abused his discretion on this

matter.

III.

In his third assignment of error, the appellant contends that his plea of guilty to larceny of military property (Specification 1 of Charge I) was improvident because a social fund checkbook is not military property. We agree.

During the providence inquiry the military judge advised the appellant that "'[m]ilitary property' is real or personal property owned, held, or used by one of the armed forces of the United States which either has a uniquely military nature, or is used by an armed force in the furtherance of its mission." Record at 77. The appellant admitted that the book of 25 checks which he took was military property belonging to the Naval Air Systems Command Reserve Program. Record at 85-86. The checks belonged to an account used to make purchases for members of the Reserve Program, such as farewell plaques and flowers for special occasions. The members contributed funds to the account. Record at 87-88.

In reviewing a post-trial claim that the appellant's guilty plea is improvident, the standard of review is that there must be a "substantial basis for finding a conflict with his plea" before we will reject the military judge's acceptance of the plea. *United States v. Logan*, 22 C.M.A. 349, 351, 47 C.M.R. 1,3 (1973); *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991). However, the mere fact that the appellant agrees to legal conclusions elicited through leading questions from the military judge is insufficient if the factual basis for the guilty plea is lacking. *United States v. Urban*, 45 M.J. 528, 530 (N.M.Ct.Crim.App. 1996); *United States v.*

Dunning, 40 M.J. 641, 646 (N.M.C.M.R. 1994).

The character of property as "military property" is a specific sentence escalator to be pleaded under Article 121, UCMJ. Consequently, it is an element that must be proven beyond a reasonable doubt before an accused can be found guilty of the offense of stealing military property. In *United States v. Sneed*, 43 M.J. 101 (1995), our superior court ruled that items of privately owned property held by the military police in an evidence locker for potential use in court-martial proceedings were "military property" for purposes of Articles 108 and 121, UCMJ. It stated that "the *function to which property is put* as evidence in courts-martial, notwithstanding that it is privately owned, qualifies that property as 'military property of the United States' while it is held in the exclusive custody of a service pending termination of its need by that service." *Id.* at 104. Unlike *Sneed*, the checkbook (and the account to which it belonged) was not utilized in furtherance of a military purpose or function. Accordingly, we find, as a matter of law, that a checkbook for what appears to be a unit social fund is not military property. We will take corrective action in our decretal paragraph.

IV.

In his fourth assignment of error, the appellant contends that the staff judge advocate's recommendation [hereinafter SJAR] was not properly served on the appellant or his counsel. This assignment of error is without merit.

A copy of the SJAR must be served upon an accused's counsel before the convening authority can act on a case. R.C.M. 1106(f)(1). If the accused's counsel is

relieved or not reasonably available, a substitute military counsel shall be appointed to act in his or her stead. R.C.M. 1106(f)(2).

At trial, the appellant requested that his copy of the SJAR be delivered to his trial defense counsel, Lieutenant Ferdenzi. Record at 157. On 1 April 1997, Ferdenzi commenced terminal leave as a prelude to his release from active duty. Appended to the record is a cover letter dated 21 April 1997, from the staff judge advocate that delivers the SJAR to the Senior Defense Counsel, Naval Legal Service Office, National Capital, because the detailed counsel is no longer on active duty. An acknowledgement of receipt appears to be initialed at the bottom of the cover letter by Lieutenant Brown. Lieutenant Thomas was appointed on 5 May 1998 as substitute military counsel for the appellant. Attachment (2) to LT Thomas affidavit of 4 August 1998. Thomas submitted two reconsideration requests for clemency to the convening authority on 27 May 1998, in which he references a SJAR dated 21 April 1997.[8] We can reasonably infer from this paper trail that the SJAR was properly served on the appellant's substitute counsel.

V.

In his final assignment of error, the appellant contends that he was denied effective assistance counsel at the post-trial stage of the proceedings. This assignment of

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[8] We note that the SJAR appended to the record is dated 6 May, rather than 21 April. In view of the fact that the record also includes a cover letter dated 21 April 1997, delivering the SJAR to the Senior Defense Counsel, we assume that the original SJAR of 21 April was later amended on 6 May.

error is without merit.

The standard of review for a claim of ineffective assistance of counsel, as applied to courts-martial, is found in *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987)(citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The competence of an accused's counsel is presumed. *Id.* at 188. To rebut this presumption, an accused must show satisfy a two-prong test by showing that (1) his counsel's performance was deficient, and (2) the deficiency prejudiced his defense. *Id.*

The right to effective assistance of counsel applies to post-trial proceedings. *United States v. Cobe*, 41 M.J. 654, 655 (N.M.Ct.Crim.App. 1994). The failure of substitute counsel to enter into an attorney-client relationship with an accused between the end of trial and the convening authority's action is error. *United States v. Howard*, 47 M.J. 104, 105 (1997).

The appellant asserts that he was never contacted by substitute counsel. Appellant's Brief and Assignment of Errors at 22; Appellant's Affidavit of 11 June 1998. We disagree.

His substitute counsel stated that he met with the appellant at the Marine Corps Base Quantico Brig on 7 May 1997. LT J.A. Thomas Affidavit of 4 August 1998. Counsel's recollection is supported by a copy of the brig's visitors log for 7 May 1997, which records his arrival at 1510 hours that day.

The appellant also argues that he did not have an opportunity to adequately respond to specific comments in

the SJAR concerning the characterization of his confinement behavior, his offer to cooperate with law enforcement officials in drug investigations, and manner in which his exemplary record of military service should be viewed. These comments were responses by the staff judge advocate to matters raised in the clemency letters of 14 January and 19 February 1997, from Lieutenant Ferdenzi. The convening authority issued his action on 13 May 1997, wherein he stated that he had considered the clemency letters.

The substitute counsel did not submit a response to the SJAR or request an extension of time to do so before the convening authority took his action. Instead, after conferring with the appellant and requesting additional information from Ferdenzi, Lieutenant Thomas submitted a renewed request for clemency and a reconsideration request for clemency, both dated 27 May 1997, to the convening authority. However, it appears that he did so before official notification of the convening authority's action was received by the appellant and his defense counsel. Request for Reconsideration of Clemency dated 27 May 1997. Thus, the convening authority still had the authority to modify his initial action if he was persuaded by counsel's plea. R.C.M. 1107(f)(2). In renewing the appellant's request for clemency, Thomas addressed the same concerns about the SJAR that the appellant now raises before this court. Hence, the appellant was able to get these matters before the convening authority for his consideration.

Based upon the facts we have before us, we find that the actions of substituted counsel were not deficient. However, even if there was error, we find that the appellant has failed to make a "colorable showing of possible prejudice." *United States v. Howard*, 47 M.J. 104, 107 (1997).

VI.

We affirm the findings of guilty, excepting the words "military property" in Specification 1 of Charge I. In light of our action on the findings, we have reassessed the sentence under the principles contained in *United States v. Peoples*, 29 M.J. 426, 428-29 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Having done so, we conclude that the original sentence was both appropriate and free of all prejudice caused by the trial error. *See United States v. Cook*, 48 M.J. 434 (1998). We, therefore, affirm the sentence as approved on review below.

R.B. LEO, Senior Judge

R.H. TROIDL, Judge

D.A. ANDERSON, Judge

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
FEB 15 2000
CLERK

(2)

No. 99-1021

In the Supreme Court of the United States

ROBERTO LAUDERBAUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was subject to trial by court-martial while he was a member of the Individual Ready Reserve for offenses committed while he was on active duty in the United States Naval Reserve.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not yet reported. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 3a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1999. The petition for a writ of certiorari was filed on December 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following trial by a general court-martial, respondent was convicted of the wrongful use of cocaine, larceny of military property, forgery, fraudulently making and uttering a check, and three counts of dishonorably failing to maintain sufficient funds in his checking account, in violation of Articles 112a, 121, 123, 123a, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a, 921, 923, 923a, and 934. He was sentenced to confinement for 22 months, forfeiture of all pay and allowance, a reduction to pay grade E-1, and a bad conduct discharge. The court of appeals affirmed. Pet. App. 1a-2a.

1. Article 2(a)(1) of the UCMJ provides that "[m]embers of a regular component of the armed forces * * * and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call * * * to obey it" are subject to court-martial jurisdiction. 10 U.S.C. 802(a)(1). Article 2(d) further provides that "[a] member of a reserve component who is not on active duty and who is made the subject of proceedings under * * * section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of * * * trial by court-martial" if the member is ordered to active duty "with respect to an offense committed while the member was * * * on active duty." 10 U.S.C. 802(d)(1)(B) and (2)(A). Similarly, Article 3(d) of the UCMJ provides that "[a] member of a reserve component who is subject to this chapter is not, by virtue of the termination of a period of active duty * * *, relieved from amenability to the jurisdiction of this chapter for

an offense against this chapter committed during such period of active duty." 10 U.S.C. 803(d).

2. In September 1990, petitioner enlisted in the United States Naval Reserve for a period of eight years. He served on active duty for four years and was released from active duty on December 27, 1995 to serve the balance of his enlistment in the Individual Ready Reserve. Pet. App. 5a.[1]

On April 5, 1996, petitioner was recalled to active duty for the purposes of a pretrial investigation regarding offenses he allegedly committed before his release from active duty. Based on a subsequent investigation, the Commander of Naval Air Systems Command convened a general court-martial to dispose of the charges. Pet. App. 5a-6a.

3. The United States Navy-Marine Corps Court of Criminal Appeals affirmed petitioner's conviction. Pet. App. 3a-14a. It concluded that Articles 2(d), 3(a), and 3(d) of the UCMJ, 10 U.S.C. 802(d), 803(a) and (d), permitted petitioner's involuntary recall to active duty for offenses committed while he was on active duty as a reservist. Pet. App. 6a.[2]

4. The court of appeals summarily affirmed, stating that "[its] decision in *Willenbring* v. *Neurauter*, 48 M.J.

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[1] As a member of the Individual Ready Reserve, petitioner was required to be screened periodically to ensure availability for mobilization. 10 U.S.C. 10149.

[2] Article 3(a), 10 U.S.C. 803(a), provides that:

> [A] person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

152 (1998), supports the finding that the court-martial had personal jurisdiction over [petitioner]." Pet. App. 1a.

ARGUMENT

1. Petitioner contends (Pet. 12-17) that the military courts lack jurisdiction over his court-martial because he had obtained "civilian status" when he was released from active duty in the reserves. That contention lacks merit.

At the time petitioner committed his offenses, petitioner was on active duty in the reserves. And, at the time of his involuntary recall into active duty, petitioner was a member of the Individual Ready Reserve under his eight-year enlistment contract with the military. At no time did petitioner's military service end.[3] Thus, under the express terms of 10 U.S.C. 802(d)(1)(B) and (2)(A) he was subject to be ordered to "active duty involuntarily for the purpose of * * * trial by court-martial * * * with respect to an offense committed while [petitioner] was * * * on active duty."[4]

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[3] Petitioner simply transferred from being a member on active duty in the Navy's Ready Reserve to a member of the Individual Ready Reserve. See 10 U.S.C. 10141 ("There [is] in each armed force a Ready Reserve."); 10 U.S.C. 10144 ("Within the Ready Reserve of each of the reserve components there is an Individual Ready Reserve. The Individual Ready Reserve consists of those members of the Ready Reserve who are not in the Selected Reserve or the inactive National Guard.").

[4] Contrary to petitioner's assertion (Pet. 16), petitioner is not in "essentially the same position as the accused in *Toth* v. *Quarles*," in which the Court held Congress could not under its Article I power extend military jurisdiction to "civilian ex-soldiers who had severed all relationship with the military." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955). Here, petitioner has *not* severed all relationship with the military, since he was a member

2. Petitioner also asserts (Pet. 8-11) that this Court should grant certiorari to resolve a split between the Third Circuit's decision in *Murphy* v. *Dalton*, 81 F.3d 343 (1996), and *Willenbring* v. *Neurauter*, 48 M.J. 152 (1998), cited by the court of appeals below, Pet. App. 1a. *Murphy* and *Willenbring* have reached different conclusions regarding whether 10 U.S.C. 802(d)(2)(A) subjects a reservist to court-martial jurisdiction for offenses committed while on active duty in the *regular* component of the armed forces. Compare 81 F.3d at 351-352 (concluding that Congress did not intend Article 2(d)(2)(A) "to subject a reservist to court-martial jurisdiction for offenses committed on active duty while in the regular component") with 48 M.J. at 174-175 ("We do not find, in either the express words of the applicable statutes, the purposes of the legislation, or the legislative history of Article 2(d), an intent to create a haven from accountability for those reservists whose prior service was in a regular rather than a reserve component.").

That division of authority, however, has no relevance to this case, because petitioner was recalled into active duty with respect to offenses committed while on active duty in the *reserves*. Indeed, the Third Circuit in *Murphy* explicitly acknowledged that a reservist in petitioner's situation would be subject to court-martial jurisdiction under Article 2(d)(2)(A). *Murphy*, 81 F.3d at 352 ("[W]e hold that the term 'active duty' in 10 U.S.C. § 802(d)(2)(A) refers to those periods of active duty served by a reservist while performing such duty

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of the Individual Ready Reserves at the time of his recall into active duty and court-martial. See also *ibid.* (recognizing Congress's power "to subject persons actually in the armed forces to trial by court-martial").

in the reserves."). Thus, even under the Third Circuit's reading of Article 2(d), the military courts had court-martial jurisdiction to try petitioner for the offenses he committed while on active duty in the reserves.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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